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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. CARLOS SANDOVAL, Defendant and Appellant.	B289571 (Los Angeles County Super. Ct. No. KA115203)

APPEAL from a judgment of the Superior Court for Los Angeles County, Thomas C. Falls, Judge. Affirmed in part, reversed in part, and remanded for resentencing.

Joseph R. Escobosa and Jenny M. Brandt, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven E. Mercer and Michael C. Keller, Deputy Attorneys General, for Plaintiff and Respondent.

Carlos Sandoval appeals from a judgment sentencing him to 35 years to life in prison after a jury convicted him of robbery (Pen. Code,[1] § 211) and assault by means of force likely to produce great bodily injury (§ 254, subd. (a)(4)), and the trial court found that he had three prior strikes under the Three Strikes law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)) and two prior serious felony convictions (§ 667, subd. (a)(1)). Sandoval contends that (1) the trial court erred in its response to a question from the jury during deliberations, and his attorney provided ineffective assistance by failing to object to the court's response; (2) the trial court erroneously sentenced him as a third-strike-offender on the assault count; and (3) the matter must be remanded to allow the trial court to exercise its discretion, under the newly-amended section 1385, regarding whether to strike the prior conviction sentence enhancements under section 667, subdivision (a)(1).

We conclude that the trial court's response to the jury's question, when considered in context, was not error, and that even if there was error, there was no reasonable probability that Sandoval would have obtained a more favorable result in the absence of the supposed error. In light of this conclusion, we also conclude that Sandoval's counsel's failure to object to the trial court's response to the jury's question did not constitute ineffective assistance of counsel. Finally, we conclude, and the Attorney General concedes, that Sandoval's latter two contentions are well taken, and the matter must be remanded for resentencing.

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1 Further undesignated statutory references are to the Penal Code.

BACKGROUND

On the night of May 3, 2017, Anthony Gonzalez was walking to a store at the intersection of Cogswell Road and Exline Street in El Monte. He was listening to music from his cell phone on his headphones. On his way, he had to walk under a freeway overpass. As he was walking under the overpass, he saw two people beating up a boy. At trial, he identified Sandoval as one of the two people; he identified Arnulfo Ernesto Meza (who was tried with Sandoval) as the other person.

As Gonzalez was walking past the men, Sandoval approached him and asked if he had seen anything. Gonzalez said he had not. Sandoval then grabbed Gonzalez's phone from his hand and punched him in the face. Meza also came over and punched him in the face, and Gonzalez fell to the ground. Both men then stomped on Gonzalez while he was on the ground. Eventually, the men stopped punching and stomping on Gonzalez and left, walking south on Cogswell Road and tossing Gonzalez's cell phone back and forth between them.

After the men left, Gonzalez went back to his house and told his father what had happened. He and his father got into his father's truck and went out to look for the men.

In the meantime, Sergeant Gary Gall of the El Monte Police Department received a call that there was a fight with three possible victims in the vicinity of Cogswell Road and Exline Street. When he arrived at the corner of Garvey Avenue and Valley Boulevard (two blocks south of the freeway overpass), he saw two men (identified as

Sandoval and Meza) walking side-by-side. As he waited for other units to arrive to assist him, he followed the two men until they split up. At that point, he saw another officer, Corporal Juan Casados, drive down the street and shine his spotlight onto Sandoval, so Sergeant Gall followed Meza and ultimately detained him.

After Corporal Casados shined the spotlight on Sandoval, Sandoval (who had been walking toward the officer) turned around and started walking in the other direction. Corporal Casados got out of his car and ordered Sandoval to stop, but Sandoval kept walking. Corporal Casados followed Sandoval on foot; the officer was in the street and Sandoval was on the sidewalk. Corporal Casados saw Sandoval reaching for something in his front waistband or front pocket, and then he momentarily disappeared behind some parked cars. While Sandoval was partly out of sight, Corporal Casados heard something drop to the sidewalk; it sounded like a hard object. Sandoval continued to walk for another five or 10 feet, then came out to the street between two parked cars and put his hands up. Corporal Casados detained Sandoval and then went back to the place where Sandoval had been when he heard the object drop. He found a cell phone there, which he retrieved. He brought the phone back to where the police cars were parked, and placed it on the sidewalk curb.

A few minutes later, Gonzalez and his father arrived; they had heard the police sirens, and drove toward them. When they arrived, Gonzalez saw Sandoval being arrested, and recognized him immediately. He got out of his father's truck and, unprompted, told the police that Sandoval was one of the people who beat him up and took

his cell phone. He saw his cell phone on the sidewalk, and identified it as his; the police had him enter his code to unlock it to show that it was his phone. Corporal Casados then drove Gonzalez to Sergeant Gall's location (which was less than a block away), where Gonzalez identified Meza as the other person who beat him up.

Sandoval and Meza were charged in an amended information with one count of robbery and one count of assault by means of force likely to produce great bodily injury. The information also alleged that Sandoval had been convicted of three prior serious and/or violent felonies as defined in sections 667, subdivision (d) and 1170.12, subdivision (b), that he had suffered two prior convictions of serious felonies under section 667, subdivision (a)(1), and that he had served two prior felony prison terms under section 667.5, subdivision (b).

Sandoval and Meza were tried together. The only witnesses to testify were Gonzalez, Sergeant Gall, and Corporal Casados. During the cross-examination of Gonzalez by Meza's counsel, counsel asked Gonzalez about some small discrepancies between his trial testimony and what an officer at the scene reported that Gonzalez had said, or what Gonzalez said at the preliminary hearing. Gonzalez testified that he did not remember making that specific statement to the officer or that specific testimony at the preliminary hearing. Gonzalez explained, "I don't remember any of it. I mean, I don't, like—I have short term memory. I don't remember the hearing because it was a year ago." Counsel asked what kind of problems he had with his memory, and Gonzalez replied, "I have no problems. I just smoke weed, and I forget stuff. That's all."

Later in the cross-examination, when addressing the discrepancy between his preliminary hearing testimony (in which he testified that Sandoval was holding the cell phone when he and Meza were walking away) and his trial testimony (in which he said he saw Sandoval and Meza tossing the phone back and forth to each other when they were walking away), counsel observed that, until the trial, Gonzalez had never mentioned them tossing the phone to each other. Gonzalez responded, "No, I missed out a couple of details." Counsel asked, "Is that because of the weed that you smoke?" Gonzalez said, "Yeah. Yes." Counsel responded, "Because of the weed you smoked, you forgot to add the detail that they were tossing the phone to each other, right?" Gonzalez answered, "Yes."

Neither Sandoval nor Meza called any witnesses or testified on their own behalf. In Sandoval's closing argument, his counsel argued that the case was entirely about identity, and in both Sandoval's and Meza's closing arguments, their attorneys argued that the jury should not trust Gonzalez's identification of them given his memory issues due to his marijuana use.

While the jury was deliberating, Meza pleaded guilty. Before the jury was informed of Meza's guilty plea, it sent out a list of questions, some of which related only to Meza, but two of which are relevant to this appeal. Question six stated: "Some of us are questioning the testimony of the victim. He swore under oath. . . . Should we be doing

this?"[2] Question seven stated: "Should we be concerned with the fact that the victim may be mentally disabled or under the influence?"

The court conferred with counsel regarding the questions, and the court and counsel came to an agreement regarding responses to each of the questions.[3] The jury was then called into the courtroom, and the court read the questions and the agreed-upon answers.

In answer to question six, the court stated, "All witnesses are required to take an oath or affirmation. It's in every case, every witness. If that doesn't answer your question and I misunderstood what you're asking, please rephrase the question for me."

The court then read question seven, and gave the following answer: "There is no evidence that the victim, Anthony Gonzalez, is or was mentally disabled or under the influence of marijuana during his testimony. Witnesses can be of any age, ethnicity, religion. They can be calm, nervous, angry, sedate, quiet, or loud. Quite frankly, they can be handsome, plain, or ugly, thin, fat, short, or tall. In this case, no

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[2] Unfortunately, the jury foreperson wrote the questions on both sides of the jury question form, but only one side was copied and included in the clerk's transcript. Therefore, we must rely upon the reporter's transcript of the trial court's reading of the question. It appears that, in stating the question, the court misspoke and then corrected itself. The complete quote from the reporter's transcript is: "Some of us are questioning the testimony of the victim. He swore under oath. Should he be doing this? Or it could be, should we be doing this?"

[3] Those answers were written down, and are included in the clerk's transcript.

witness should be evaluated based on outward appearances. You are also referred to CALJIC 2.20 and 2.21.1."[4]

After giving the responses, the trial court turned to counsel and asked, "And those are the responses agreed to by the parties?" Both the prosecutor and Sandoval's attorney answered in the affirmative.

The jury continued deliberating, and returned a guilty verdict on both counts against Sandoval. A bench trial was conducted on the prior conviction and prison term allegations, and the court found the allegations to be true. The court sentenced Sandoval to 25 years to life on the robbery count, plus an additional 10 years for the prior serious

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[4] CALJIC Nos. 2.20 and 2.21.1 previously had been read to the jury. CALJIC No. 2.20, as given to the jury, states: "Every person who testifies under oath or affirmation is a witness. You are the sole judges of the believability of a witness and the weight to be given the testimony of each witness. [¶] In determining the believability of a witness you may consider anything that has a tendency reasonably to prove or disprove the truthfulness of the testimony of the witness, including but not limited to any of the following: [¶] The extent of the opportunity or ability of the witness to see or hear or otherwise become aware of any matter about which the witness testified; [¶] The ability of the witness to remember or to communicate any matter about which the witness has testified; [¶] The character and quality of that testimony; [¶] The demeanor and manner of the witness while testifying; [¶] The existence or nonexistence of a bias, interest, or other motive; [¶] The existence or nonexistence of any fact testified to by the witness; [¶] The attitude of the witness toward this action or toward the giving of testimony; [¶] A statement previously made by the witness that is consistent or inconsistent with his or her testimony." CALJIC No. 2.21.1, as given to the jury, states: "Discrepancies in a witness's testimony or between a witness's testimony and that of other witnesses, if there were any, do not necessarily mean that a witness should be discredited. Failure of recollection is common. Innocent misrecollection is not uncommon. Two persons witnessing an incident or a transaction often will see or hear it differently. You should consider whether a discrepancy relates to an important matter or only to something trivial."

felony convictions under section 667, subdivision (a). The court also imposed a third-strike 25 years–to–life sentence on the assault count, but found that section 654 applied, and ordered the sentence to run concurrently with the sentence on the robbery count. The court struck the prior prison term enhancements for sentencing purposes. Sandoval timely filed a notice of appeal from the judgment.

DISCUSSION

A. *The Trial Court's Response to Jury Question No. 7*

Sandoval contends the trial court committed error in its response to jury question seven by stating that there was no evidence that Gonzalez was mentally disabled or under the influence of marijuana during his testimony, and that "[i]n this case, no witness should be evaluated based on outward appearances." He argues that the error was prejudicial because, as shown by jury questions six and seven, the jury had doubts about Gonzalez's credibility, which was the key issue in the case, and the court's response to question seven "in essence told the jury that its perceptions were wrong, . . . that Gonzalez's testimony was credible," and that the jurors could not consider Gonzalez's demeanor. We find no error.

The California Supreme Court has instructed that "[a] California trial court may comment on the evidence, including the credibility of witnesses, so long as its remarks are accurate, temperate, and 'scrupulously fair.'" (*People v. Melton* (1988) 44 Cal.3d 713, 735.) In this case, the trial court's statement that there was no evidence that

Gonzalez was mentally disabled or under the influence of marijuana while testifying was an accurate statement.

During his testimony, Gonzalez made two references to his use of marijuana. The first reference had to do with why he forgot things he said a year ago; he explained, "I have no problems. I just smoke weed, and I forget stuff. That's all." The second reference had to do with why he left out certain details when he testified at the preliminary hearing; he agreed with Meza's counsel's statement that he forgot to include those details when he testified at that hearing "[b]ecause of the weed [he] smoked." Neither of those statements suggests that Gonzalez was under the influence of marijuana during his trial testimony. Although either defendant's counsel could have asked Gonzalez whether he was under the influence at trial or while testifying at the preliminary hearing (see *People v. Melton*, *supra*, 44 Cal.3d at p. 737), they chose not to do so. Thus, there was no evidence from which the jury could conclude that Gonzalez was under the influence of marijuana while he was testifying, and the trial court appropriately instructed them on this point.

The other statement Sandoval challenges—"In this case, no witness should be evaluated based on outward appearances"—when considered in isolation, may appear to be contrary to the law. (See, e.g., *People v. Garton* (2018) 4 Cal.5th 485, 501 ["a jury may consider a witness's demeanor while testifying in order to determine the witness's credibility," and "demeanor can include everything from facial expressions and hand gestures to tone and attire"].) But when read in context, the statement's reference to "outward appearances" must be

understood to relate to a witness's immutable characteristics—i.e., an instruction that the jury must not base its credibility determinations on improper prejudice—rather than an instruction that the jury was not to consider Gonzalez's demeanor in assessing his credibility. First, the statement immediately followed the court's statement that a witness "can be handsome, plain, or ugly, thin, fat, short, or tall." Second, the statement immediately preceded the court's direction to refer to CALJIC Nos. 2.20 and 2.21.1, and CALJIC No. 2.20 instructed the jury that it may "consider anything that has a tendency reasonably to prove or disprove the truthfulness of the testimony of the witness, including . . . [¶] The demeanor and manner of the witness while testifying." In short, the jury was properly instructed that it should not judge Gonzalez's testimony based upon such things as whether he was tall or short, fat or thin, but that it could consider his demeanor while testifying in determining his credibility.

In any event, even if the trial court's statement could be interpreted as a misstatement of the law, we find it is not reasonably probable that a more favorable result would have been reached absent the error. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) The evidence that Sandoval committed the crimes at issue, though circumstantial, was extremely strong even without Gonzalez's testimony: Sergeant Gall testified that he spotted Sandoval and Meza just a few blocks from the site of the assault and robbery very shortly after the assault and robbery took place. Corporal Casados, who arrived while Sergeant Gall was following Sandoval and Meza, testified that as soon as Sandoval saw him, he turned and started walking away, despite commands to

stop. He also testified that Sandoval took the cell phone out of his pocket or waistband and dropped it on the sidewalk out of Corporal Casados's sight before he finally surrendered to police. Finally Corporal Casados testified that minutes later, Gonzalez arrived at the scene, said that Sandoval was the person who took his cell phone, and used his code to unlock the phone, establishing that it was his. In light of this testimony, we conclude that if there was error in the trial court's response to jury question seven, the error was harmless.

B. *Ineffective Assistance of Counsel*

Sandoval contends he received ineffective assistance of counsel because his trial attorney failed to object to the trial court's response to jury question seven. "To establish ineffective assistance of counsel, a petitioner must demonstrate that (1) counsel's representation was deficient in falling below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's deficient representation subjected the petitioner to prejudice, i.e., there is a reasonable probability that, but for counsel's failings, the result would have been more favorable to the petitioner. [Citations.] 'A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citation.]" (*In re Neely* (1993) 6 Cal.4th 901, 908–909, quoting *Strickland v. Washington* (1984) 466 U.S. 668, 694.)

In light of our conclusion that even if the trial court's response to jury question was erroneous, there was no reasonable probability that a more favorable result would have been reached absent the error, Sandoval's ineffective assistance of counsel claim necessarily fails.

C. *Sentence on the Assault Count*

As noted, the trial court imposed a 25 years to life sentence on the assault count under the Three Strikes law, and ordered that sentence to run concurrently with the sentence on the robbery count. Sandoval contends the sentence on the assault count was erroneous because the crime of which he was convicted—violation of section 245, subdivision (a)(4)—is not a serious or violent felony under sections 1192.7 and 1192.8, and thus does not qualify for sentencing as a third strike.

The Attorney General agrees that Sandoval could not be sentenced as a third strike defendant on the assault count under the facts of this case. The Attorney General also notes that the court's imposition of a concurrent sentence on the assault count was improper because it found that section 654 applied.

We concur with both parties. Therefore, we will remand the matter to the trial court for resentencing on the assault count. And, because the trial court found that section 654 applies, the court is directed to impose and stay the sentence on the assault count pending completion of the term on the robbery count, at which time the stay will become permanent. (See *People v. Deloza* (1998) 18 Cal.4th 585, 591-592.)

D. *Amendment of Section 1385 Requires Remand*

In March 2018, when Sandoval was sentenced, section 1385 expressly stated that the trial court was not authorized to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under section 667. (Former § 1385, subd. (b).) After he was

sentenced, Senate Bill No. 1393 was signed into law (effective January 1, 2019), amending section 1385 to remove the prohibition against striking prior convictions under section 667. Thus, trial courts now have the discretion to strike prior convictions under section 667 if the requirements in section 1385 are met.

Sandoval contends the amended section 1385 applies retroactively to him, and the matter must be remanded so that the trial court may have an opportunity to exercise its discretion in determining whether to strike the prior conviction enhancements imposed under section 667, subdivision (a)(1). The Attorney General concedes that Sandoval is entitled to a resentencing hearing for this purpose. We agree.

DISPOSITION

The judgment is reversed to the extent the trial court imposed a concurrent 25 years to life sentence on the assault count. The matter is remanded for a resentencing hearing with directions to the trial court to resentence Sandoval on the assault count, and stay that sentence pending completion of the sentence on the robbery count, at which time the stay will become permanent. The trial court also is directed to consider whether to strike either or both of the five-year terms imposed under section 667, subdivision (a)(1). In all other respects, the judgment is affirmed.

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WILLHITE, J.

We concur:

MANELLA, P. J.

COLLINS, J.